

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: April 23, 2015; Ruling No. 2015-4141; Agency: Department of Behavioral Health and Developmental Services; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Behavior Health and Developmental Services
Ruling Number 2015-4141
April 24, 2015

The Department of Behavior Health and Developmental Services (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to the grievant’s February 5, 2015 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding her grievance.

FACTS

On or about February 5, 2015, the grievant initiated a grievance with the agency. The first step response was delivered to the grievant on March 10.¹ Having received no further response from the grievant, on or about March 26, 2015, the agency mailed, by certified mail, a notice of noncompliance to her. In its notice of noncompliance, the agency requested a response from the grievant within five workdays of her receipt of the notice. The certified mail receipt indicates that the notice of noncompliance was delivered on the following day, March 27. As more than five workdays have elapsed since the grievant received notice of her alleged noncompliance and she has not yet advanced or concluded her grievance, the agency seeks a compliance ruling allowing it to administratively close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EDR’s involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.³ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming

¹ Although the agency included a letter with the grievance packet that states the second step response is enclosed, there is nothing to indicate that the grievance advanced beyond the first step. It appears instead that the agency’s letter contains a clerical error, and the response delivered to the grievant on March 10 was indeed the first step response. Ultimately, this issue is immaterial as the grievant has failed to comply with the grievance procedure as discussed below.

² *Grievance Procedure Manual* § 6.3.

³ *See id.*

noncompliance may seek a compliance ruling from EDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.⁴

In this case, the grievant appears to have failed to advance or conclude her grievance within five workdays of receiving the agency's first resolution step response, as required by the grievance procedure.⁵ Moreover, the agency notified the grievant of her noncompliance and she has not advanced or concluded her grievance.

As the grievant has apparently failed to advance or conclude her grievance in a timely manner, she has failed to comply with the grievance procedure. We therefore order the grievant to correct her noncompliance **within ten workdays of the date of this ruling** by notifying her human resources office in writing that she wishes either to conclude the grievance or proceed to the second step. If she does not, the agency may administratively close the grievance without any further action on its part. The grievance may be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, or other circumstances beyond the grievant's control).

EDR's rulings on matters of compliance are final and nonappealable.⁶



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⁴ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁵ See *Grievance Procedure Manual* § 3.1.

⁶ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).